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Labour Migration Regimes in the
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EQUIVOCAL CLAIMS? AMBIVALENT CONTROLS? LABOUR MIGRATION REGIMES IN THE EUROPEAN UNION

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INTRODUCTION

The objective of this paper is to examine claims about labour migration regimes in the European Union (EU). The European context is a particularly interesting one as it is highly dynamic and reveals deep cleavages in perceptions and meanings of control. I will examine the subject under the following headings:

1. The European integration dynamic;
2. Fragmentation and the foreigner;
3. Tools of control and control of tools.

This is an examination of a labour migration scheme which is designed around the abolition of controls on economic migration of all kinds on persons depending on reciprocity on the basis of nationality. It reveals a number of features which confound many commonly held premises about labour migration:

- The abolition of controls on labour migration has had a minimal effect on movement of workers in the EU notwithstanding the EU's latest enlargements to relatively poor states in Southern and Central and Eastern Europe;¹
- The entitlement of intra-EU labour migrants to equal treatment with nationals and full access to social benefits has not resulted in widespread abuse nor in a diminution by Member States of their social benefits or concerted attempts to limit access by labour migrants (with notable exceptions such as the UK);²
- Very generous rules on family reunification has not resulted in widespread 'abuse' in fact notwithstanding the right to be joined by a wide range of family members, most labour migrants are joined only by spouses and young children only;

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1 Galgoczi, Leschke and Watt 2009.

2 Triandafillidou and Gropas 2007.

- The identity move from discriminated against ethnic minority foreigner/migrant to individual entitled to equality and increasingly invisible as a target of racism can take place very quickly. The key appears to be public leadership committed to equality;
- When labour migrants are beneficiaries of full equal treatment rights in wages and working conditions, secure residence rights and a right to family reunification, they cease to be categorized as 'unwanted' migrants even if they work in disfavoured sectors which are relatively poorly paid; the discourse of highly skilled workers as welcome and low skilled migrant workers as unwanted disappears;
- When states lift their hand off labour migration allowing people to make their own choices neither does this operate as a solution to labour needs nor unemployment. People do not necessarily or, in the EU example, even normally or usually move from countries of high unemployment and low social benefits to countries with low unemployment and high social benefits. Where states have labour shortages their administrations are still required to take active efforts to recruit labour migrants as only statistically low numbers of persons move spontaneously;
- This experience characterised by high and rapid achievement of social inclusion and harmony tends to be disregarded when EU policy makers come to address their question of labour migration from outside the EU;
- The lesson which the EU does seem to have retained from the abolition of controls on movement of persons for economic purposes is territorial. The completion of the Schengen area without internal border controls on the movement of persons has been a substantial success for the participating countries (which do not include Ireland and the UK).

THE EUROPEAN INTEGRATION DYNAMIC

The European Union is founded on three international treaties which have been subject to regular amendment and addition but which have retained their primary objective – the creation of an internal market – and added to it the establishment of monetary union. The creation of the internal market means, according to these treaties, the abolition on the control of persons crossing intra Member State borders and free access to the labour market and self employment for nationals of the Member States.³ Thus, in labour migration terms, the purpose which the EU was given in 1957 (and which has remained with it) has been to oblige Member States to abandon control over labour migration of

3 And their third country national family members who accompany or join them there.

nationals of the participating states.⁴ In this regard the EU is a de-securitization project as regards labour migration.⁵

In order to achieve the project, a series of activities along the way were necessary and surprisingly often engaged the vexed question of labour migration. First, the EU had to establish its law as taking precedence over national law. This was a monumental task which required civil servants in the Member States to be persuaded to apply EU law rather than national labour migration rules in respect of nationals of the Member States.⁶ To succeed in this objective, the national courts of the Member States were engaged – first to accept that EU law has priority, secondly that the decisions of the European Court of Justice which interpret EU law take priority over decisions of their national courts (supreme courts etc) and thirdly to discipline civil servants who failed to apply EU law.⁷ This process took place gradually over a period of about 30 years from 1957-1987 with many set backs along the way but eventually arriving more or less at the objective. There are still examples of Member States failing properly to implement EU free movement of persons rules and the ECJ judicially slapping their wrists for failure to fulfil their obligations. Generally, however, where caught misapplying EU free movement rules, Member States change their rules and practices to conform, even where there has been substantial political investment in the issue.⁸

The loss of control over labour migration of nationals of the EU Member States is fairly complete. EU nationals know they are entitled to move and look for work anywhere in the EU. Employers know that they can hire EU nationals without checking for work or residence permits.⁹ State authorities are often unaware of who is on their territory or only become aware of the economic migrant some time well after he or she has begun working there for some time, for instance when the EU migrant worker files a tax return. Even those states, which keep an eye on who is on the territory through population registers, do not always capture EU nationals. When one such state, Germany, argued that

4 Guild 2004.

5 Waever, Buzan, Kelstrup and Lemaitre 1993.

6 Majone 1994.

7 Burley and Mattli 1993.

8 A good example of this relates to the attempt by a number of EU states to regain control over the migration of third country national family members of migrant EU nationals. The ECJ found these efforts inconsistent with the EC Treaty and required the states to abandon their control practices. Within six months, all the offending states had changed their policies and practices (*Metock*, ECJ 25 July 2008). Handoll 2009.

9 Enlargement of the EU creates ambiguities when nationals over accession states are usually not permitted free movement as workers immediate but have to wait a specified number of years before enjoying that status. Nonetheless, there has never been a limitation on free movement for other purposes including self-employment – Huysmans 2000.

it was entitled to include in its database on foreign nationals, details of EU citizens exercising their rights, the ECJ retorted that this was unnecessary as anonymous information was sufficient for the purpose and was less intrusive on the data protection rights of individuals. Further the ECJ held illegal the German argument that the personalised data was necessary for fighting crime as it discriminated between EU citizens from other Member States and German citizens who were not subject to inclusion on the database.¹⁰

While the grip of Member State bureaucracies was being prized off labour migrants who were nationals of other Member States, so too the number of Member States was changing. While the EU began with six Member States (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) it gained:

- Denmark, Ireland and the UK in 1973 (current populations: 5.5 million, 4.5 million and 61 million);
- Greece in 1981 (current population: 11.2 million);
- Portugal and Spain in 1986 (current populations: 10.6 million and 45.8 million);
- Austria, Finland and Sweden in 1995 (current populations: 8.3 million; 5.3 million; 9.2 million);
- Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia in 2004 (current populations: 0.8 million, 10.4 million, 1.3 million, 10.0 million, 2.2 million, 3.3 million, 0.4 million, 38.1 million, 5.4 million and 2.0 million) and
- Bulgaria and Romania in 2007 (current populations 7.6 million and 21.5 million).¹¹

The enlargement process is not yet over.¹² There are currently three candidate countries: Croatia, Macedonia and Turkey and five potential candidate countries: Albania, Bosnia, Kosovo, Montenegro and Serbia (not to mention Iceland). Each has its own timetable and action plan. The combined population of the EU is just under 500 million ranging from 82.5 million in Germany (though the population was increased by a third when reunification of East and West Germany took place in 1990) to under 0.5 million in Malta. Of the candidate and potential candidate states, the only one with a population over 7.5 million (Serbia) is Turkey with a population of 72.5 million people.

As regards labour migration, the control claims of the Member States are gradually abandoned in the context of enlargement. Twice, in 1973 and in 1995, the nationals of the Member States joining the EU were not subject to

10 C-524/06 *Huber* 16 December 2008.

11 Verdun and Croce 2005.

12 House of Lords 2006.

any temporary restriction on free movement of workers. From one day to the next, all the states had to abandon their control claims over migrant workers from Denmark, Ireland and the UK in 1973 and Austria, Finland and Sweden in 1995. In the 2004 enlargement, workers from Cyprus and Malta were accorded immediate free labour migration rights. However, for all the other states engaged in the enlargements there has been a delay in the abandonment of labour migration controls over their nationals. The usual period for the delay is 5-8 years. The end of the delay period arrived on 1 May 2009 for the Member States which joined on 1 May 2004 (with an exceptional extra two years for Austria, Germany and the UK). For Bulgaria and Romania, 2012 will be the final date for lifting controls (other than a possible exceptional two year period).

For the purposes of European integration, it makes no sense to discuss integration without bearing in mind the dramatically changing composition of the EU-integration into what is a more useful question. Each Member State has a vote at the Council, sends a Commissioner to the European Commission, a judge to the European Court of Justice and participates in the European Parliament by way of direct suffrage which while taking into account the populations of the Member States also ensures that the small Member States are entitled to elect deputies. It is not just the space and population which is transformed by enlargement, the institutions as well undergo substantial changes.¹³

Regarding workers, however, it is worth remembering that on 9 December 2004 the UK's final judicial instance, the House of Lords, gave its judgment¹⁴ regarding the legality of the UK immigration authorities stationing their officers at Prague airport (Czech Republic) to advise airlines not to permit some passengers to board planes bound for the UK. The reason for UK immigration officers to advise airline staff to prohibit boarding to some persons was on the basis of ethnic origin and immigration suspicions. The UK authorities feared that some passengers who were Czech nationals but ethnically Roma might make asylum applications which the UK authorities considered unfounded as they deemed the Czech Roma to be disguised economic migrants, if these passengers arrived in the UK. The UK government fears were fully described in terms of percentages of asylum applications and rejection rates for Czech Roma over the preceding years. The UK court found the checks illegal on grounds of racial discrimination. However, on 1 May 2004, all Czech nationals, including ethnic minorities, became citizens of the European Union and entitled to free movement as workers or to seek jobs and self employment in the UK or anywhere else in the EU. The same people, Czech Roma, who had been the subject of

¹³ Meunier and McNamara 2007.

¹⁴ *R v SSHD ex p ERRC* [2004] UKHL 55.

very intrusive exclusion policies of the UK authorities (unlawfully on the grounds of ethnic origin) had the right to move to work in the UK even before the UK's highest court found the state exclusionary activity unlawful.¹⁵ While the UK court only found that the extraterritorial controls were illegal because they constituted racial and ethnic origin discrimination (in other words not condemning the UK authorities for the practice of extraterritorial controls in general) the membership of the Czech Republic to the EU freed Czech Roma from any controls on labour migration at all. One might say that the court was extremely timid in comparison with the UK state authorities which abolished labour migration control altogether for the persons in respect of whom, only shortly before, they had been spending substantial public resources to prevent their labour migration.¹⁶

Loosening the grip of EU state authorities over labour migration by nationals of newer Member States is not self evidently easy. It must happen, but as the above example shows, it is often contested. Nonetheless it does happen because Member State authorities accept that it must happen.¹⁷ For instance, not only have almost all of the Member States which joined the EU in 2004 opened their labour markets to workers from Bulgaria and Romania but so have Sweden, Greece, Spain and Portugal (in that order). In the context of candidate states, only Turkey presents a challenge as regards workers' rights mainly because of migration politics in Austria and Germany. The other candidate states do not have populations sufficient large to be perceived by policy makers in the EU as an issue sufficiently serious to engage with.¹⁸

Once the emphasis is on a *right* to free movement to work and the Member State authorities are prohibited from interfering with that right: they may not require nationals of other Member States to seek work permits, are barred from requiring nationals of other Member States to obtain residence permits etc. the question is why do people not move. According to the European Commission, approximately 2% of the inhabitants of the EU live in a country other than that of their nationality. For the 2004 Member State nationals, the figure rose from 0.2% in 2003 to 0.5% by the end of 2007. A similar increase has occurred as regards Bulgarians and Romanians. As the Commission points out, of the 2004 Member States, mostly Poles, Lithuanians and Slovaks have moved, nationals of the rest of those states have mainly stayed at home. Of those who have moved, their main destination countries have been Ireland and

15 Goodwin-Gill 2005.

16 Zaiceva and Zimmermann 2008.

17 Border controls have been a particularly contested area, see Atger-Faure 2008.

18 European Commission, http://ec.europa.eu/enlargement/press_corner/key-documents/reports_nov_2006_en.htm and <http://ec.europa.eu/social/main.jsp?catId=466&langId=en>.

the UK. Of the 2007 Member State nationals, most have gone to Spain and Italy.¹⁹ Claims that there is a bottomless pool of labour migrants waiting to move as soon as controls are lifted are not substantiated by the EU experience. In fact, there are very few migrant workers available as most people will stay at home even though the unemployment and wage differentials are impressive. According to Eurostat, the EU's statistical agency, in December 2008 unemployment stood at 2.7% in the Netherlands and 14.4% in Spain. Statutory minimum wages are under 300 Euros per month in Bulgaria, Estonia, Latvia, Lithuania, Hungary, Poland and Romania; between 301 and 999 Euros per month in the Czech Republic, Greece, Malta, Portugal, Slovenia and Spain and more than 1,000 Euros per month in the rest (at least the rest of those states which have minimum wages). The highest minimum wage is in Luxembourg at 1,570 Euros per month.

The average minimum salary in Denmark is the equivalent of 1,850 Euros per month, 1,277 Euros in Germany and 1,258 Euros in France. But the average salary in Portugal is 470 Euros per month, 246 Euros in Poland and 92 Euros in Bulgaria (for some of these countries there is a narrow range).²⁰ Money does not explain EU migration patterns any more satisfactorily than unemployment rates. Further, notwithstanding the relative levels of movement of Romanians and Bulgarians to Spain since 1 January 2007 and the relatively high unemployment rate in that country, Spain lifted restrictions on movement of workers from the two countries as from 1 January 2009. Thus the decisions on labour migration which EU Member States make cannot be explained by the application of simplistic economic rational choice theory. What is original about the EU labour migration system is that it is based on reducing to the point of vestigial the labour migration control claims of the Member States and leaves in the hands of the individual the choice whether to move or not.²¹ At the same time, the system is characterised by substantial worker protection – maximum working hours, minimum holiday entitlements etc. Further, the Member States have comprehensive sickness insurance and health care systems, unemployment and social benefits for the elderly and their care. Social solidarity has not been impaired as a result of permitting unlimited labour migration in an ever larger EU.

19 Press Release, European Commission 'Free Movement of workers is good for Europe's economy', 18 November 2008.

20 European Union, Minimum Monthly Salaries 2008 http://europeanunionaffairs.suite101.com/article.cfm/european_union_minimum_monthly_salaries_2008.

21 Guild 1999.

FRAGMENTATION AND THE FOREIGNER

As outlined above, in a fairly short period of time, the EU has changed its size and shape and the status of people living within it.²² Many people move seamlessly from irregular status in one country to citizen of a Member State entitled to residence, work (and social benefits) without crossing any border or making any application. They are embraced by EU law, which transforms their status from irregular labour migrant in national law to EU citizen with an entitlement to unimpeded labour migration. The same is likely to happen again as enlargement continues. This means that the border between legality and irregularity, between state immigration control over labour market access and a prohibition on state control is fluid. However, fluidity does not end there. Third country nationals who are family members of EU migrant workers are entitled to residence and access to employment, which the host Member State is not permitted to question or restrict. While third country national family members can be required to obtain visas for entry and residence cards (according to EU law rules) so long as their principal is a worker there can be no resources requirement, no health insurance requirement and a right to equal treatment. Even if the third country national was irregularly in the host state before the marriage to an EU national, the state cannot 'punish' the couple for that irregularity by requiring the third country national to leave to obtain a visa (this, according to the European Court of Justice would be disproportionate).²³ Third country national family members of EU nationals who have exercised their working rights are defined by EU law – all spouses, children under 21 or over that age if dependent (it does not matter if children are married etc), ascending and descending relatives who are dependent on the worker and or his or her spouse. There is a duty to facilitate the admission of wider family members if they are dependent and in need.²⁴ On the basis of equal treatment with that of own nationals, unmarried partners, civil partnership and same sex relationships must be recognised for the purpose of residence and work of the third country national partner.²⁵ Thus the state's control over third country nationals is also fluid as they too move from the grip of national law to rights holders in EU law.

There are a number of agreements with third countries (i.e. countries which are not EU Member States) which give their nationals the right to move to and work in the EU on the same basis as nationals of EU Member States. These countries are Iceland, Norway and Switzerland. An agreement with Turkey

²² Mantu 2008.

²³ Kofman 2004.

²⁴ Carrera 2005.

²⁵ Article 2 Directive 2004/38.

gives its citizens who have gained lawful access to the labour market of a Member State the right to retain that labour market access and after four years to have free access to the labour market of that Member State. Some agreements with other third countries, such as Croatia and Macedonia, include provisions which permit their nationals to have access to self employment in any Member State. However, under these agreements, the individual must obtain a residence permit though the rules on the issue of the residence permit must not add further (national) criteria to those contained in the agreements themselves. A variety of other agreements with third countries provide a right for companies of the third country to send their workers to an EU Member State to carry out services, while still more agreements provide a right to equal treatment in wages and working conditions and in social security for their workers who are working (lawfully) in the EU.²⁶

From 1999, the EU was accorded a series of powers to adopt legislation regulating the status of foreigners who are third country nationals (ie not nationals of any EU state). These powers cover asylum, border controls and migration.²⁷ Statistically, the largest single group of third country nationals who gain access to the EU labour market are people granted entry on the basis of family reunification. As regards family reunification of third country nationals with other third country nationals who are already resident in the EU, Member States no longer are entitled to apply their national laws. An EU directive sets out the conditions which can be applied. While the threshold for family reunification of third country nationals is higher in terms of the conditions which must be fulfilled than its counterpart for EU nationals who exercise their treaty rights, nonetheless, it is EU law not national law.²⁸ The loss of control over access to the territory and labour market of third country nationals which is inherent in the family reunification directive was sufficient to inspire three Member States, Denmark, Ireland and the UK to refuse to participate. They remain in splendid isolation running their own immigration systems regarding family reunification.

For family reunification of third country nationals there is still the appearance of national control. Family members may still be required to obtain visas from national consulates, they are required to obtain work and residence permits when they arrive in the destination EU state. For the individual, it appears as if the state is still very much in control – applying its laws, requiring national rules to be complied with. But the reality is somewhat different. EU law defines the conditions for family reunification of third country nationals with third coun-

26 Billet 2009 (forthcoming).

27 Peers and Rogers 2006.

28 Oosterom-Staples 2007.

try nationals already in the EU. Member States no longer have the power to change the rules of family reunification. They have a few discretionary clauses (like the much discussed provision on integration measures and tests)²⁹ which were inserted, often at the last minute into the EU measures to provide an assurance to national officials that they are still in charge.³⁰ But as Groenendijk has pointed out, because these provisions exist in EU measures, they are subject to interpretation by the European Court of Justice – the Member States no longer have the last word even on these little ‘sovereignty’ cards.³¹ While it will be some time before the full effect of the transformation of state sovereignty will become apparent, it is already in practice. In a debate in the Netherlands in 2008, some political actors wanted to raise the age limit for spouses to be able to join third country national sponsors there. Denmark had recently done just this.³² The matter never even became a serious part of the debate on family reunification as the EU Directive does not permit Member States to add new obstacles to family reunification.

Similarly, the EU adopted a measure creating a common status of EU third country national who has been resident for five years lawfully on the territory of a Member State. For these persons, not only is there a common EU status which protects labour rights and excludes their expulsion except on the limited grounds permitted in the Directive, but it also extends the possibility for long term resident third country nationals to move and exercise economic activities in other Member States. Once again, in the Directive there are a number of ‘sovereignty’ card provisions which provide the appearance of control by Member State authorities. But the matter is now EU law and no longer sovereign to the Member States. Again, for labour migrants, it may appear that it is still the Member States that are in charge, but the Member States’ margin of action is highly diminished, their authorities are bound to apply the EU directive (except for Denmark, Ireland and the UK which, once again, chose not to participate). The odd result of this measure in the context of enlargement is that, for instance, a Russian national who has lived and worked for five years in Romania and obtained a long term resident card, will have a right to access to the German labour market (subject to delays which Germany can apply for up to 12 months) sooner than a Romanian national.³³

The most complicated issue in the EU as regards national control over extra Union labour migration is first access to the labour market. Here, notwithstand-

29 Oers, R. van 2009.

30 Groenendijk, Fernhout, Van Dam, Van Oers and Strik 2006.

31 Groenendijk 2007.

32 Walter 2008.

33 Carlier and Guild 2006.

ing proposals first put forward by the European Commission in 2001, it was only in 2009 that a measure was adopted on the subject.³⁴ For my purposes, what is important is what it means for sovereignty and the right of states to control migration. The decision of the European Commission to break economic migration into different strands – highly skilled, researchers and students, inter-company transferees and low-skilled seasonal workers – and to make different sets of rules of each of the categories is very significant regarding the way in which labour migration control is perceived among the Member States. This is because it heralds the allocation of different rights to third country national workers depending on their value to the EU labour market. Unlike the lesson of EU national labour migration where all workers are entitled to the highest level of rights available to national workers, when it comes to third country national migrant workers it looks like there will be substantial differences. Highly qualified third country national workers are given better rights than lower skilled workers. The principle appears to be that the economically stronger should be privileged and the equally needed by economically weaker migrant workers should be deprived of rights. These rights take the form of security of residence, equality of wages, access to social benefits and family reunification.

The illusion of control (to which I will return below under tools of control) is compounded by the illusion of capacity to choose. The mantra of ‘managed migration’ based on rational choices about labour market needs drives the vision that state authorities are capable of choosing ‘good’ labour migrants and rejecting ‘poor’ labour migrants. Indeed, good usually means highly skilled and poor means exactly that those without resources. In the European context there are traditionally three mechanisms which have been applied to separate the good from the poor labour migrants and thus to achieve what is considered a beneficial managed migration system. First, potential labour migrants must fulfil criteria on skills – unless they meet skills levels established by national legislation they will not be permitted to migrate. Secondly, the authorities apply a labour market test – is there anyone in the EU labour market already who could take the job – if so the labour migrant should be rejected. Thirdly, salary levels – only labour migrants who will be paid over a certain salary will be admitted. The skills criteria has been subject to endless discussion about what kind of skills are needed – should there be priority lists of skills in short supply, how are such lists to be determined. Regarding the labour market test, the fairly obviously illusory nature of such a test, which must be applied to the labour market of 27 Member States with a population just short of 500 million, is hard to disguise. The local nature of so many labour markets is evidenced by

34 Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

the low movement rates of nationals of EU Member States. The salary requirement has been very seductive to some Member States but then has fallen out of favour to some extent as it means the potential migrant must already have a job offer, which could stifle initiative and self-employment which would create jobs. Also, some jobs carry high salaries but not high social acceptance. Under the Dutch skilled migrant programme a salary level is determinant for the issue of labour migration authorisations except for three categories of workers: football players, Imams and prostitutes. The three sit uncomfortably beside one another as a class of their own.

Another problematic aspect of the good and poor labour migrant approach in the EU is that Member States acknowledge very different labour market needs. For instance, in Spain and Poland, the authorities acknowledge that their economies need agricultural workers in substantial numbers. While other Member States also need agricultural workers they are often less honest about the fact. Thus a good labour migrant in Poland is not necessarily the highly skilled Indian IT worker who was the object of Germany's Green Card system launched in 2000 (and revised in 2004) but the low skilled Ukrainian agricultural worker. Further, with the ageing of Europe, more and more care workers willing to work in the home with the elderly are needed.³⁵ In Italy there is substantial labour migration from the Philippines and elsewhere to fulfil this need.³⁶ But these workers are not classified as the good migrants according to the scheme of directives even though they are the ones which the economy may need most. The dominance of the managed migration discourse means that the good labour migrant is always defined as the highly skilled/paid. Because he or she is classified as desirable, there is an assumption that there is competition among states to encourage the individual to move to their country. This assumption then justifies the differential treatment of the desirable labour migrant. In order to encourage him or her to come to the EU the rules of migration must include entitlements to good conditions of entry, family reunification, labour market access, social conditions and access to social benefits.³⁷

However, the contrary assumption applies to the poor labour migrant, although he or she may be even more valuable to the economy than the highly skilled/paid labour migrant. Because he or she has been classified as poor, it is assumed that there is an enormous pool of such migrants available to come to the host state to do the work. Thus according to the market approach to human beings, there is no need to provide good conditions of entry, family reunification, labour market access, social conditions or access to social benefits to these

35 Johnson and Zimmermann 1993.

36 Castles and Miller 2005.

37 Bigo and Guild 2005.

persons. The assumption about the nature of the work and its value to the economy justifies that discriminatory treatment of the labour migrant. So-called low skilled workers are made subject to restrictions that their residence will be temporary as when they leave the assumption is that there will be others will to take their place. These workers are then accorded a more precarious work and residence permit, excluded from social benefits and often excluded also from long term residence status.³⁸

As has been extensively examined in gender studies, the allocation of the titles highly skilled and low skilled tend to have gender consequences. They are used to justify differentials in treatment, which reinforce gender stereotypes and have the consequence of limiting women's access to economic stability. Ann Tickner's work in particular has focused on the intersection of migration and the precariousness of women's economic status.³⁹ In the European labour migration context, it is also interesting to note that many of the jobs most likely to fulfil the highly skilled categories are those where there is a differential in gender privileging men. Some of the medical sciences and teaching are an exception to this norm but those exceptions only emphasis the generality of the gender element in the determination of high skilled versus low skilled labour migrants.

TOOLS OF CONTROL AND CONTROL OF TOOLS

The mechanisms of labour migration have been changing in the EU over the last ten years. Two developments are particularly important. The first has been a trend to carry out labour migration control outside the state. Thus EU states require labour migrants to be outside the country when they or their employer makes an application for a work permit and that the labour migrant obtain a visa before travelling to the state. Paradoxically, this externalisation of labour migration control has the effect of putting the individual much farther from the officials who must apply a labour market test (if one is applied at all). One solution which the UK has adopted, is to move the decision making abroad as well in order to follow the externalisation of the control process. So instead of officials with knowledge of the labour market making the decision on access for a potential immigrant, it is officials in the UK consulates in the country of origin who make the decision. In terms of ministerial competence, the employment and trade ministries are edged out of the equation and the interior ministry seeks to embed itself in the consulates which belong to the foreign ministry. As the externalisation takes hold, the control of the foreign ministries becomes more evident. In order to diminish this rather troublesome formula, many of the labour

38 Groenendijk 2007.

39 Tickner 1999.

migration control mechanisms are transferred to agencies – in the UK case the job of assessing and issuing visas was hived off to the UK Visas Agency (under joint foreign and interior ministry control) and dealing with immigration controls to UKBA (UK Borders Agency).

The second development is the identity of those engaged in controlling labour migration. As Guiraudon has developed, the move of mechanisms of control has not only moved out beyond the borders it has also moved within the state. The introduction of sanctions against employers for hiring workers who have not been authorised by the state has been a regular feature of EU state labour market control over the past ten years.⁴⁰ In 2009, the EU adopted a Directive on sanctions against employers for employing undocumented migrants. This has the interesting effect of once again changing the nature of sovereignty as regards this type of tool in relation to labour migration. On the one hand, the private sector is obliged to take on the task of labour migration control on pain of sanctions, usually financial penalties, for failure correctly to carry out the task, on the other hand, the power to make rules about those sanctions moves away from that of the Member State into the hands of the EU authorities.

This change in the nature of the actors is not exclusive to the way in which labour migration is controlled within the state. It also applies in the extraterritorial move as well in the form of carriers' sanctions. The development of private sector controls sanctioning employers accompanies the measures which have already been adopted at EU level sanctioning travel companies (excluding train companies) which bring to the external border of the EU persons who are not then admitted.⁴¹ These sanctions have been put into place as a mechanism to make sure that visa rules are respected – the transport companies are required to make sure that travellers have the right documents for entry into the EU so that those who do arrive at the borders are likely to be admitted on pain of a sanction against the transport company.

The place of the controls bears attention. The tools of control in the EU are primarily:

Visas which must be obtained abroad, accompanied by sanctions on transporters;

- External border controls which may be carried out at external borders or more often just beyond the borders of EU states;
- Work and residence permits which must be obtained in the state, accompanied by sanctions on employers;

⁴⁰ Guild and 2006.

⁴¹ Scholten and Minderhoud 2008.

- Police registration systems whereby the worker must provide personal details.

The disciplining measures are refusal of visas, entry, work or residence permits, police investigations, fines on transport companies, employers and expulsion of the worker. The measures take place in a variety of different places and by an increasingly diverse number of actors. There is a division of powers to make law between the EU and the Member States. As the Member States seek more consistency in how labour migration rules in other Member States are applied and carried out, so in the process they relinquish increasing power themselves to control labour migration. As the idea of making the private sector take more responsibility for labour migration in the form of transport companies checking work permits and employers subject to fines for employing migrants without the necessary documents, so too the capacity of the state to control labour migration is paradoxically weakened. Where the state previously took a more important role in certifying labour migrants one by one, as the control function is hived off to the private sector the capacity to know exactly what is going on is not necessarily enhanced. If one of the justifications for the move is that there will be public financial savings, then the commensurate increase in the number of labour inspectors is unlikely to take place.

The EU is struggling at the moment with the question of where the tools are controlled. While the three 'opted out' Member States – Denmark, Ireland and the UK remain strictly sovereignist in respect of all the activities, the rest of the EU is moving in quite a different direction. Increasingly, measures on labour migration, border control, extra-territorial controls on movement of persons and visa issuing are all moving into the exclusive competence of the EU. The tools which Member States have, but also which they are obliged to use, are formulated within the EU institutions. Once the measures are adopted the Member States are obliged to carry them out faithfully. Some activities have been hived off into EU agencies – specifically FRONTEX to which I will return below in greater depth. The control of the tools has moved to the EU though the tools of control must be carried out primarily by the Member States.

As regards visas, short stay visas are a matter of EU law. The reasons for issuing or refusing to issue a short stay visa (Schengen visa) is a matter covered by the EU's Common Visa Code became effective on 5 April 2010.⁴² As regards long stay visas, some are covered exclusively by EU law rules – such as those for family reunification others are partially covered for instance in the highly skilled migrant directive though Member States retain the right to issue national visas. There are still very substantial variations among the Member

42 Regulation 810/2009.

States in how they apply EU law on the issue even of short stay visas – while the overall refusal rate of short stay visas in the EU is about 10% the variations between Member State consulates in the same country can be very substantial indeed.⁴³ For instance, as regards applications for short stay visas made in Nairobi, Kenya in 2007: ⁴⁴

- Germany: 4687 applications; 740 refusals;
- France: 2808 applications; 248 refusals;
- Italy: 2634 applications; 74 refusals;
- Netherlands: 2556 applications; 247 refusals.⁴⁵

At the EU's external border, there is a clearer picture of the changing control of the tools. On the one hand there is an EU regulation on admission and refusal of individuals at the external borders of the EU.⁴⁶ This regulation has been in force since 2006 and requires officials carrying out border controls to do so in a manner which does not discriminate on the basis of race, ethnicity, religion or gender. Further, where an official refuses admission to an individual this must be in accordance with the rules set out in the regulation. The individual must be given notice of refusal in writing and informed of his or her right of appeal against that decision.

The control of the EU's external border is coordinated by an EU agency, FRONTEX, which is charged with ensuring the proper coordination of the maintenance of external border controls.⁴⁷ It is not charged with ensuring that the EU's border control law is correctly carried out. FRONTEX has been very much in the news on account of its role coordinating maritime actions to prevent irregular migration into the EU in the Atlantic around the Canary Islands (part of Spain) and in the Mediterranean around Malta and the Italian island of Lampedusa which is closest to the African coast.⁴⁸ The activities of FRONTEX and the manner in which the operations it has been coordinating have been carried out are controversial. As its role is one of coordination, it depends on the Member States making available for actions their coast guard boats and personnel. These personnel and boats continue to be regulated according to national law rather than EU law resulting in fairly substantial incoherence among the actors. UNHCR has been particularly concerned about the activities

43 Beaudu 2007.

44 <http://register.consilium.europa.eu/pdf/en/08/st08/st08215.en08.pdf>.

45 See UNHCR Statistics on Refugee Protection 2007, table 13.

46 The Schengen Borders Code: Regulation 562/2006.

47 Regulation 2007/2004 establishing External Borders Agency.

48 http://www.frontex.europa.eu/newsroom/news_releases/art40.html; Carrera 2007; Human Rights Watch September 2009.

as it is not clear that refugees are able to make their claims to asylum under the conditions of these controls.⁴⁹

As regards work and residence permits, a directive has been adopted on highly qualified migration only.⁵⁰ The main weakness of the directive is that it neither sets a minimum standard nor a maximum one for the admission of highly qualified migrants to the EU. Thus Member States are not constrained either by upper or lower limits to issue work and residence permits in accordance with the Directive.⁵¹ For the moment this is still a matter of Member State control as regards first admission and residence for other categories of labour migrants. However, as mentioned above, there are agreements with third countries which require Member States to privilege the treatment of nationals of the other party.⁵² EU law, of course, regulates the issue of work and residence permits for third country national family members admitted under the Directive.⁵³ Further, once the labour migrant has lived for five years in the EU he or she will be eligible for long term residence status and access to the whole of the EU labour market thus control passes to the EU to make the rules and ensure that national officials apply them consistently and correctly.⁵⁴

Once inside the EU the border control picture changes again. The same regulation which establishes the common external border control regime also requires all EU states (except Denmark, Ireland and the UK) to abolish all internal controls on the movement of persons. It does not matter whether those persons are EU nationals or third country nationals. The power of the state to control is prohibited. While at airports this is hard to see as security controls on identity carried out by airways replaces the identity controls which had been carried out by officials, the difference is important.⁵⁵ On trains, roads and buses across Europe the change is immediately evident. In fact it is so evident that there is great annoyance when state officials carry out identity checks in-

49 'UNHCR and Frontex have begun discussions on cooperation, as foreseen in the Frontex Regulation and proposed by the Commission in its Communication on Reinforcing Management of the EU's Southern Maritime Borders. UNHCR is willing to collaborate with Frontex to ensure that personnel deployed on joint operations are trained in the essential principles of international law and refugee protection. Guidance would appear also to be necessary on how border operations can be carried out in a way that ensures consistent respect for international refugee law. UNHCR calls on the Presidency and other Member States to support development of this cooperation in relevant priority areas, including training, exchange of information relevant to risk analysis, and others.' UNHCR, July 2007, http://www.unhcr.org.ua/news.php?in=1&news_id=112.

50 Directive 2009/50 adopted on 25 May 2009.

51 For a more substantial analysis of the proposal before adoption see Guild 2007.

52 Gutmann 2000.

53 Condinanzi, Lang and Nascimbene 2008.

54 Groenendijk 2007.

55 Hobbing 2005.

side their borders on travellers. These checks are still permitted under the EU rules which require the abolition of intra Member State border controls but they must not replace border controls.⁵⁶ Their objective must be exclusively police measures and they must be justified. Thus these controls, in law, are very different from immigration controls. In practice they are gradually becoming so as well. The EU labour migrant whether an EU citizen or third country national does not (normally) encounter the state at the EU's intra Member State borders. The encounter, if it occurs at all, will happen well after the individual has arrived and may never happen.⁵⁷

A further restriction on the Member States' right to control labour migration within the EU takes the form of the EU rules on service provision. If the third country national is working in one Member State and is sent to another by his or her employer to carry out a contract (even if this takes some time) EU rules protect the right of the business to send its employee across the EU border for this purpose. As there is no intra Member State border control, the individual moves to where the work is to be carried out, carries out the activity and generally returns home. The state may never be aware of the fact that the individual was on the territory. This has caused some Member States substantial anguish about who is on their territory but also about the collection of taxes in respect of work carried out on their territory. The Belgian authorities have put in place an on line registration system where enterprises must notify the state when any worker from outside Belgium comes to carry out services for more than three days in the country so that the state can impose social charges, taxes etc. it is unclear just how successful this system is.⁵⁸

In the 2010 climate of rising unemployment and great job insecurity, the possibility of posted workers arriving from other Member States to carry out contracts has become increasingly politically charged. In Sweden, a highly controversial case of a company which engaged Estonian workers and posted them to Sweden to carry out works without fulfilling the social and wage conditions applicable to Swedish workers was determined by the European Court of Justice in 2007.⁵⁹ Notwithstanding rage on the part of the trade unions, the ECJ upheld the right of companies to send their workers to carry out services across EU borders. The actual reasoning of the ECJ perhaps does not merit all the antagonism which it has elicited. The court did not exclude the right of the state to ensure the wage and social standards are equivalent for posted workers as for national workers but found that Swedish legislation did not provide for the ap-

56 Article 21 Schengen Borders Code.

57 Bertozzi 2008

58 Watson 1983.

59 Tans 2008.

plication of this power in accordance with EU law. In the UK, in February 2009, the posting of Italian and Portuguese workers to carry out works in Lincolnshire at the oil company Total's refinery there gave rise to unauthorised industrial action by workers demanding 'British jobs for British workers'. But most posting of workers passes unnoticed because there are no border controls on movement of persons within the territory (the UK excepted of course). The numbers and impact of posted workers also seems to militate against state authorities becoming aware of their presence except when there are substantial teams of workers who move together to a worksite.

While the right of Member States to control labour migration within the EU and increasingly into it has diminished the desire to control has not. Within the part of Member States interior and justice ministries there continues to be substantial concern about the loss of control and the consequences which this has, not least on the professional futures of the individuals involved. On the one hand, the explosion of interest in all matters even tangentially connected with security which followed the 11 September 2001 attacks in the USA provided legitimacy to those expressing concern about the loss of control over movement of persons, including labour migrants in the EU. On the other hand, the exponential growth of technical capacity in information technology provided undreamt of possibilities for collecting, storing and using information, including information about individuals. Interest in security as an issue of movement of persons and the possibility to collect and use information collided over the first ten years of the new millennium leading towards new ways of controlling movement of persons.⁶⁰ The European Commission proposed a border package on 13 February 2008 aiming at establishing an EU entry/exist system registering the movement of specific categories of third country nationals at the external borders of the EU, as well as a border control mechanism (Automated Border Control System) enabling the automated verification of travellers' identity based on biometric technology.⁶¹ The idea is that people will swipe themselves in and out of the EU under the watchful eye of border guards. Their information will be checked against the widest possible group of EU databases (for asylum seekers, criminals etc).⁶²

The security tools and techniques envisaged by the Commission are three-fold:

⁶⁰ Brouwer 2008.

⁶¹ Commission Communication, on an entry/exist system at the external borders of the European Union, facilitation of border crossings for bona fide travellers, and an electronic travel authorization system, COM(2008) final, Brussels.

⁶² Guild 2008.

1. The setting up of a new European-wide database containing specific information on certain categories of non EU-nationals;
2. Interoperability of the database with other already existing and planned EU databases and biometric systems.
3. The systematic checking of everyone entering and leaving the EU with at least three categories of persons: those third country nationals who have visas containing biometric data which will be checked at the border; third country nationals who do not need visas for a short stay in the EU whose biometric data will be taken at the border; citizens of the Union whose biometric data will be incorporated into their passports which will be swiped on entry and exit.

It shows most starkly the changing nature of the ambition of control. What is new in the package is a threefold change in thinking about migration control. First, it is no longer about sovereignty and its cut free for state borders. Instead, it may take place anywhere no longer tied to the purpose of marking the border between places and states. Secondly, it is no longer about the division of persons between citizens and foreigners. All persons would be subject to the system of control irrespective of nationality. Everyone is controlled when he or she is in the process of moving. Thirdly, control is intrinsically linked to the allocation of an identity which is held in a database (probably centralised). The individual is subject to a control of his or her identity against the prototype which is held by the control authority. Of course, the proposal raises a whole series of issues about protection of personal data. But more centrally, it indicates a change in the way the EU perceives migration and people. The vocation to control the foreigner is able to morph into an ambition to allocate identity and control any individual against the official, ideal identity. Labour migration control appears to give way, in this scenario to control which is no longer about labour nor even about migration as the citizen and the foreigner are equally subject to control. Nor is it ultimately related to the state and sovereignty as the actor at the heart of the control is the EU. It points towards a change in governmentality, to use Foucault's term. There is a ground shift in the way in which the exercise of power constitutes authority and is inscribed on the body of the individual.

CONCLUSIONS

At the outset of this paper I set out a number of contentions to be exemplified. Now I will assess those contentions on the basis of the research. First, regarding free movement of workers, the EU experience indicates that abolishing controls on labour migration based on reciprocity even among countries with very different standards of living, minimum wages, standards of social benefits and

unemployment rates does not result in (a) significant movement (b) a reduction of social solidarity or (c) a rise in xenophobia.

Secondly, the EU experience of developing a labour migration system beyond national sovereignty and no longer on a reciprocal basis shows much greater fears of foreign workers which result in the diminution of rights and a restrictive approach. Thirdly, the move of power to control labour migration from state borders and sovereign decisions to EU mechanisms appears to facilitate the move beyond the borders to mechanisms of immigration control embedded in third countries, the high seas (i.e. beyond sovereign territory) and into the private sector. The burden of carrying out controls is moved to carriers and employers, in other words the private sector. Fourthly, while security claims around hard state sovereign border controls have lost much of their appeal in the EU, instead, the security claims have fuelled the development of supranational electronic control systems repleted with large-scale data bases filled with personal data on people on the move.

What the EU experiences seem to indicate for the future is an increasing irrelevance of state borders for the movement of labour migrants and an increase of electronic surveillance detached from specific territorially symbolic places. The objective of the new forms of surveillance appear to be to track the individual and his or her economic activities in order to discipline a substantial array of actors inside and outside the remit of state sovereignty as it is usually visualised on maps.

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